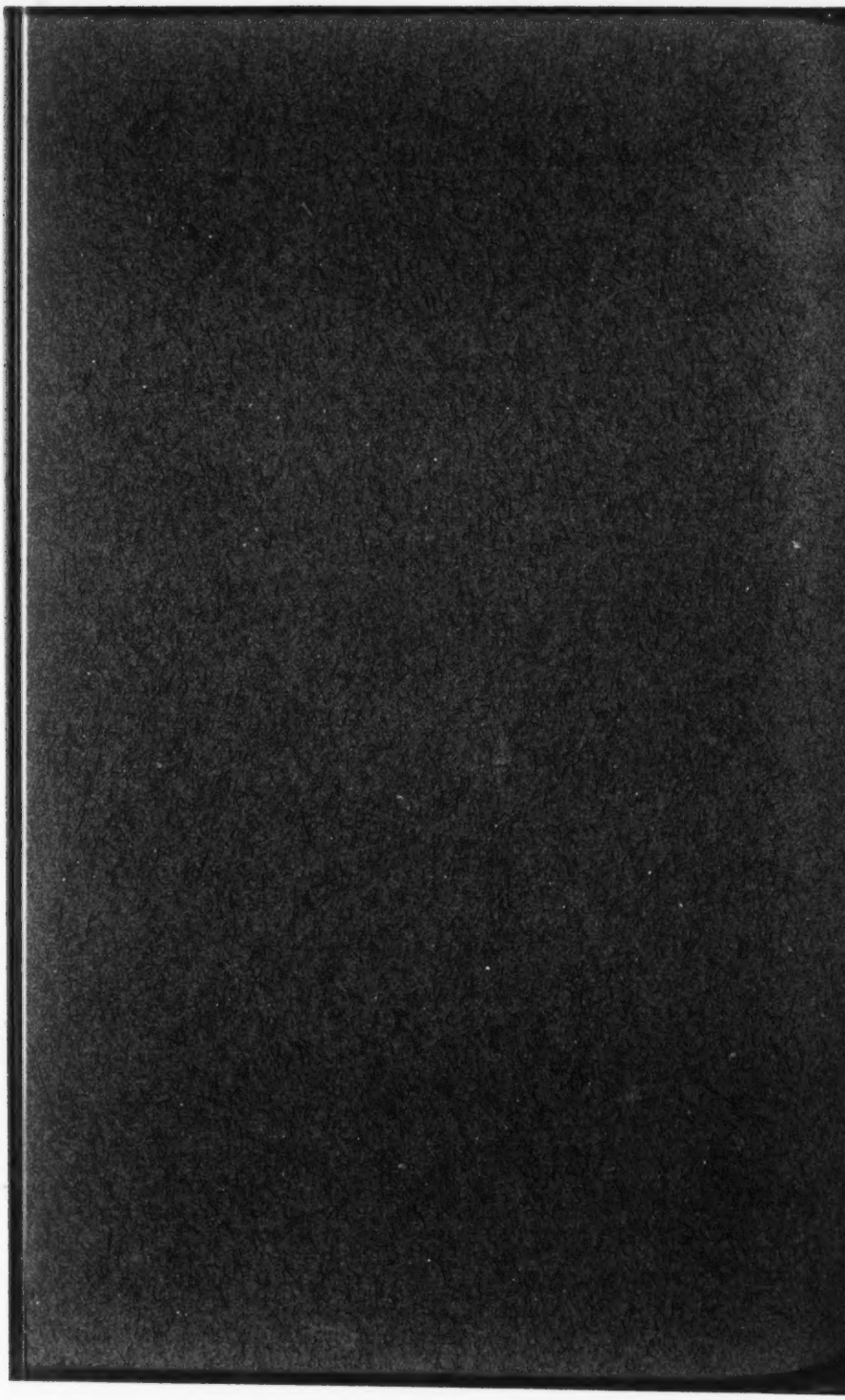

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542537—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 148

N. N. S. MATCOVICH, PETITIONER

v.

CLIFFORD C. ANGLIM, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

There is no opinion of the District Court. The opinion of the Ninth Circuit Court of Appeals (R. 138) is reported in 134 F. 2d 834.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 30, 1943 (R. 146). A petition for a rehearing was filed by the taxpayer on April 17, 1943, and was denied by the Circuit Court of Appeals on May 22, 1943 (R. 146). The petition for a writ of certiorari was filed July 6, 1943.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in holding that the petitioner was the employer of the women dancers in the dance hall operated and owned by him and therefore liable for taxes levied by the Social Security Act.

STATUTE INVOLVED

Social Security Act, c. 531, 49 Stat. 620:

> SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:
>
> (1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;
>
> (2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;
>
> (3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.
>
> (U. S. C., Title 42, Sec. 1101.)

* * * * *

SECTION 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except— * * *.

(U. S. C., Title 42, Sec. 1107.)

STATEMENT

This case was tried by the District Court, sitting without a jury (R. 23–24). The court made the following findings of fact (R. 24–27):

1. That during the period beginning January 1, 1937, to and including December 31, 1937, the taxpayer controlled and operated a dance hall located in the City of Sacramento, State of California, known as the "Rio Ball Room." A beer garden where refreshments were sold was operated by taxpayer in connection with the dance hall. During all of this time the taxpayer owned

and/or furnished all of the equipment and supplies used in the conduct of the beer garden and ballroom, and paid the rental of the hall to the owner thereof. The number of taxpayer's employees at all times exceeded eight persons. Complete control of egress and ingress, the selling of tickets, the dance floor, the beer garden, and all adjuncts, was exercised by taxpayer. (R. 24.)

2. The taxpayer made arrangements for a sufficient number of women dancers, commonly referred to as "taxi dancers" to dance with the male patrons of the dance hall. Each "taxi" dancer was "licensed" by taxpayer. On arrival she reported either to taxpayer or his agent. The hours during which the taxi dancers should be present in the dance hall, and the length of time to be consumed by them in drinking with male patrons, were prescribed by the taxpayer. The dress, deportment, and behavior of the taxi dancers were controlled and prescribed by taxpayer. (R. 24–25.)

The compensation of the taxi dancer was paid as follows: Dance tickets were sold by taxpayer to male patrons at ten cents per ticket. The ticket gave the purchaser the right to dance with a taxi dancer. She was obliged to dance with a ticket holder whenever he presented himself. The ticket was surrendered to the taxi dancer at the beginning of each dance. At the conclusion of the

evening, the taxi dancer presented her tickets to the taxpayer's cashier, who paid her five cents for each ticket surrendered by her. The taxi dancer was paid a commission upon the refreshments purchased by her male partner. She was obliged to dance a certain number of dances which were "free," i. e., she did not receive compensation for them, although the male dancer paid for each dance. (R. 25.)

3. Before securing the right to dance at the Rio Ball Room, each taxi dancer applied to and received from the taxpayer a license or contract which in terms gave her the privilege of dancing with the patrons of the dance hall in consideration of the payment to the dance hall of part of the money earned by her. The license or contract in terms specified that the woman dancer was a licensee and would not become an employee of the dance hall. (R. 25–26.) The license also contained the agreement that (R. 26):

> The licensee agrees to abide by regulations established by the undersigned (Rio Ball Room) in the operation of its business.

The taxpayer reserved and, in fact, exercised the right to hire and to discharge the women dancers (R. 26).

The Commissioner of Internal Revenue made an assessment under the Social Security Act which was and is based on the amount paid by taxpayer

to the taxi dancers of the Rio Ball Room during 1937. Between June 25, 1939, and December 16, 1940, taxpayer paid to the Collector of Internal Revenue the sum of $2,426.25 (inclusive of interest and penalties) on account of the tax assessment for Social Security taxes. Thereafter, and within the time permitted by law, taxpayer filed with the Commissioner of Internal Revenue a claim for refund of such tax payments grounded on the claim that the women dancers were not employees of the taxpayer and that the relationship which existed between taxpayer and the women dancers during the whole of such period was one of independent contractor and independent contractee. On July 10, 1941, the claim for refund was rejected. The suit herein was based upon the same ground as the ground relied on in the claim for refund. (R. 26–27.)

Upon the basis of these findings the trial court concluded that the women dancers were employees of the petitioner and ruled that the Commissioner had correctly rejected the claim for refund (R. 27). The court below affirmed.

ARGUMENT

Title IX of the Social Security Act provides that on or after January 1, 1936, every employer shall pay for each calendar year an excise tax, with respect to having individuals in his employ.

The court below held, correctly we submit, that the relationship between the taxpayer and the taxi dancers who worked in the hall operated by him was that of employer and employees within the meaning of the Social Security Act. Although it may be conceded that the dancers were allowed a certain amount of latitude in their work, it is nevertheless clear that petitioner exercised sufficiently continuous supervision over them so as to render them employees rather than independent contractors. The case turns upon its own facts and does not call for further review.

Respectfully submitted.

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JULY, 1943.

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